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No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PORTLAND TERMINAL COMPANY, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit is reported at 155 F. 2d 215. The opinion of the District Court is reported at 61 F. Supp. 345.

JURISDICTION

Action was originally brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of

the Fair Labor Standards Act (c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.) in the United States District Court for the District of Maine to restrain respondent from alleged violations, forbidden by Sections 6, 11 and 15 of the Act. From final judgment of the aforesaid Court dismissing the cause petitioner appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the judgment of the District Court on April 29, 1946. Petition for certiorari has been filed with this Court under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347).

STATEMENT OF THE CASE

By complaint filed in the District Court of the United States for the District of Maine, Southern Division, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, sought to have Portland Terminal Company, Defendant, enjoined from alleged violations of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act in so far as these sections relate to the payment of minimum wages to and the keeping of records in respect of persons called "trainees" who apply to the Portland Terminal Company for employment as yard brakemen and who are engaged in training in order that they may qualify for such positions. The questions presented to the District Court for decision were the narrow ones of whether "trainees" of Portland Terminal Company are employed by that company within the meaning of the Fair Labor Standards Act and whether such

trainees, even if held to be employees, are engaged in commerce or in the production of goods for commerce within the meaning of Section 6 (a) of the Act.

District Judge John A. Peters, before whom the case was tried, dismissed the complaint.

The Plaintiff, hereinafter referred to as the Petitioner, appealed to the United States Circuit Court of Appeals on the general ground that the trial judge erred in ruling that trainees for the jobs of brakemen at Defendant's railroad terminal were not employees of the Defendant, hereinafter called Respondent, within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs. The Circuit Court affirmed the judgment of the District Court, deciding as a matter of law that the trainees were not employees of Respondent within the scope of the Fair Labor Standards Act. Counsel for Respondent on briefs filed both in the District Court and the Circuit Court, contended not only that the trainees were not employees, but also that they were not engaged in commerce. This latter point, though not abandoned, has not been decided, the Circuit Court saying: "Because of the disposition we make of this case, it is unnecessary for us to consider whether these trainees are engaged in interstate commerce." 155 F. 2d 215, 216.

It is believed that there is no dispute as to the facts and that those of importance and pertinence are succinctly summarized by Judge Peters in his opinion, which is set forth in full at the end of this brief and designated APPENDIX A. On the mar-

gins opposite each finding appropriate notations referring to the record indicate the evidence upon which the finding or conclusion is based.

There follows a summary of facts pertinent to establishment of the nature of the relationship between the trainee and the Terminal Company. Each of the following statements is of a fact as found by the Trial Court below upon the evidence or as stated in evidence and in no wise modified or contradicted by other testimony.

SUMMARY OF FACTS

1. A period of training is necessary to qualify an inexperienced man for the job of yard brakeman. (R. 38, 39 Thomas; R. 87, 88, 89, 90 O'Neil; R. 108, 109 Dykeman; R. 123 Opinion).

2. Satisfactory training must consist both of observation and performance of acts under supervision. (R. 39 Thomas; R. 90 O'Neil; R. 110 Dykeman).

3. For many years prior to the enactment of the Fair Labor Standards Act, Portland Terminal Company and other railroads have engaged in the practice of teaching applicants for jobs. (R. 40 Thomas; R. 108, 109 Dykeman).

4. While being taught, applicants for jobs as yard brakemen are called "trainees." (R. 4 Complaint; R. 15 Amended Answer; R. 123 Opinion).

5. Such applicants have always understood that they would receive no pay while training. (R. 103, 104 Strout; R. 105, 106 Johnson; R. 124 Opinion; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

6. Trainees have never looked upon themselves as employees. (R. 109 Dykeman).

7. The Company does not consider trainees to be employees. (R. 41 Thomas; R. 125 Opinion).

8. Employees of the Company and the Union representing them do not look upon trainees as fellow-employees. (R. 112 Dykeman; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

9. Trainees have considered that they were being taught the duties of a yard brakeman in order that they might obtain such a position. (Plaintiff's Exhibit No. 3, R. 114, offered R. 27).

10. A trainee is instructed by the members of a full regular yard crew. (R. 33, 39 Thomas; R. 109, 110, 111 Dykeman).

11. No trainee ever takes the place of a regular member of a yard crew. (R. 39 Thomas; R. 109, 110, 111 Dykeman; R. 123 Opinion) and recollections of a trainee as to working without a full regular crew were demonstrated to be false. (R. 76 Widor; R. 99 Tracey).

12. All acts performed by a trainee are done in the immediate presence of and under the immediate supervision of a member of the regular yard crew. (R. 109, 110, 111 Dykeman).

13. A trainee is always an extra and unnecessary man. (R. 123 Opinion).

14. The trainee does not aid the work of a yard crew but rather impedes it and slows it down. (R. 109 Dykeman; R. 124 Opinion).

15. The length of the training period is not fixed but depends upon the aptitude of the student and averages 7 or 8 days. (R. 39 Thomas; R. 90 O'Neil; R. 102 Quincy; R. 110 Dykeman; R. 124 Opinion).

16. The yard conductor determines when a trainee has qualified, and upon the conductor's certification the trainee's name automatically "goes on the board" among the names of other employees. (R. 30 Thomas; R. 102 Quincy; R. 124 Opinion).

17. Trainees are not subject to rules or discipline applicable to employees. (R. 39, 40 Thomas; R. 85, 86 Haney; R. 112 Dykeman; R. 125 Opinion).

18. Trainees are expected to remain during a work day with the assigned crew but if they do not do so, they are not penalized, nor are their training privileges terminated. (R. 39, 40 Thomas).

19. Since October 1, 1943, by virtue of a supplemental agreement with the Union representing qualified employees, applicants who have completed their training and become employees are given an allowance of $4.00 a day for time spent training. (Plaintiff's Exhibit No. 7, R. 118, offered R. 33; R. 125 Opinion).

20. Trainees who do not complete training receive no allowance and applicants for training privileges are so notified at time of application. (R. 103 Strout; R. 105, 106 Johnson; R. 125 Opinion).

21. Neither the acts performed by trainees nor the hours spent by them on railroad property are

of any immediate advantage to the railroad. (R. 39 Thomas; R. 109 Dykeman; R. 123, 124 Opinion).

Upon consideration of all the facts, the District Judge concluded that no employment relationship exists between Portland Terminal Company and those persons being instructed by it and known as trainees. He, therefore, found that no wage obligation arose and that payment to qualified employees of an allowance for "time spent training or failure to make such an allowance was immaterial." These findings were premised upon the ground that the Act does not create new employment relationships or new wage liabilities but regulates such when they exist. Accordingly, the Court " . . . finding no violation of law and no reason to apprehend any . . . " (R. 126 Opinion) caused judgment to be entered dismissing the complaint.

The facts are again summarized succinctly, and comprehensively analyzed, together with the findings of the Trial Court, in the opinion of Mahoney, J., 155 F. 2d 215. The decisive point in that opinion is that the activities of the trainees are of primary benefit to them rather than to the railroad. The fact that they exert themselves or suffer a modified control is of no more significance than would be the presence of these elements in the case of an author who for his own benefit and to fit him to write a railroad novel, was allowed to do work on railroad premises.

ARGUMENT

A. Elements Necessary for Granting of Certiorari are Absent in This Case.

As stated in Rule 38.5 of the Revised Rules of this Court, " . . . review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." There appears to be no exception in favor of an officer or agency of the United States.

This Court is asked to issue a writ of certiorari in this case on the sole ground that the First Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be settled by this Court.

It is significant that the Administrator did not seek a writ of certiorari in the case of *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 (C. C. A. 5th 1945), which involved a factual situation similar to that in the instant case, and in which the Court in an unanimous opinion determined that railroad "trainees" were not employees under the Fair Labor Standards Act.

In course of argument before the Circuit Court, counsel for the Administrator was asked by the Court, in substance, why the Administrator had not sought certiorari after the decision in the Jacksonville case, and reply was made to the effect that a split of decisions between the circuits was being sought in order to insure the granting of certiorari. In this aim, the Administrator has been disappointed. There is no lack of uniformity of decision. The question here at issue has been decided

against the Administrator by so many tribunals that denial of his petition will effectually settle this matter. There is less reason to grant certiorari in this case than in *Schroepfer* v. *Abell Company, Inc.*, 138 F. 2d 111, certiorari denied 321 U. S. 763, and again 322 U. S. 770.

Not only is there no conflict of decisions in various circuits with respect to the law involved in this case, but there is overwhelming as well as unanimous authority supporting contentions of the Respondent. The questions presented in the instant case have, in slightly differing factual situations, been passed upon by seven Federal Courts and the Administrator's contentions have been repudiated by all of them. The cases are:

Walling, Administrator v. *Jacksonville Terminal Co.* (1944) D. C. S. D. Fla., 55 F. Supp. 302;

Walling, Administrator v. *Jacksonville Terminal Co.* 5 Cir. 1945, 148 F. 2d 768;

Walling, Administrator v. *The Nashville, Chattanooga & St. Louis Railway* (1945) D. C. M. D. Tenn., 60 F. Supp. 1004;

Walling, Administrator v. *The Nashville, Chattanooga & St. Louis Railway*, 6 Cir. June 1, 1946, 155 F. 2d, 1016;

Walling, Administrator v. *Portland Terminal Co.* (1945) D. C. S. D. Maine, 61 F. Supp. 345;

Walling, Administrator v. Portland Terminal Co. 1 Cir. 1946, 155 F. 2d 215;

Walling, Administrator v. *Norfolk Southern Railway Company* (July 9, 1946) D. C. E. D. of No. Car., July 9, 1946, F. Supp.

The belief of the Administrator that a conflict of decisions in various circuits was necessary to in-

sure granting of certiorari was well founded as the instant case does not present questions of federal law which require decision by this Court.

The decision below does not make inoperative the congressional intent evidenced by the Fair Labor Standards Act to set aside sub-standard employment terms forced by employers on unorganized employees and does not restrict or impair Section 14 of the Act.

The Fair Labor Standards Act was enacted to guarantee certain minimum benefits to "employees." It was not passed to create an employee-employer relationship, where one never before existed. In the words of the Court in the Jacksonville case, "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law." The instant decision does not represent a refusal to apply such standards to a situation which was intended by Congress to fall within the provisions of the Act.

A decision which holds only that "trainees" who have never been "employees" were not made employees by the Fair Labor Standards Act does not go sufficiently to the heart of the Act and to the purposes intended to be accomplished thereby to create a federal question requiring a decision by this Court.

Section 14 of the Act by its very terms applies only to the employment of learners and apprentices. The tests of whether learners are employed are no different from tests applicable to other alleged employees. A person learning an occupation on the premises of a business may be its employee

or he may not. Before there is any occasion to consider the provisions of Section 14, it must first be determined through application of the indicated tests that the trainee is an employee. It cannot have been the intention of Congress to limit opportunities for studying industrial occupations to persons who are employees or to impose upon all such students an employee status.

> "And it is urged that Section 14 of the Act condemns this training plan unless under a special certificate and with wages specially fixed by the Administrator for learners. We do not construe Section 14 as aimed at curtailment of teaching the industrial arts, but rather at helping learners and other handicapped persons who could not command for their services the full wages fixed by the Act, to get them employment at less wages rather than no employment at all. The Section lays a duty on the Administrator to provide for such persons. But its provisions apply only to the 'employment' of learners and the 'employment' of handicapped persons. If any person is willing to use such employees in his business, that is, to employ them he must obtain a certificate and a lower wage fixed by the Administrator in order to escape the demands of the Act. But if he is not *employing* learners, but is in good faith endeavoring merely to *teach* them, the Section does not apply for no wages at all are due." *Walling* v. *Jacksonville Terminal Co.* (1945) 148 F. 2d 768, 770.

While the legislative history of the Act may demonstrate that Congress determined " . . . to place the regulation of the *employment* of all beginners in the hands of the Administrator . . . "

(Petitioner's brief, page 17) it also demonstrates that Congress did not decide or desire to place the regulation of all beginners whether employed or not in the hands of the Administrator. Section 14 by its use of the term "the employment of learners" clearly indicated that the Administrator's task was limited to securing for employees, whether or not trainees, the standards fixed by law. The Administrator, not content to remain within the field marked out by Congress, now seeks to reach out to regulate not "the employment of learners" but all learners whether or not employed.

Petitioner argues exhaustively at pages 15, 16 and 17 of his brief that the legislative history of the Act reveals Congressional intent to cover the trainee. This point has been judicially determined adversely to the contention.

> "There is nothing in the legislative history of the Fair Labor Standards Act to show Congressional intent to cover the trainee under the Act. On the contrary, the legislative history shows that Congress intended a wage and hour law for the benefit of underpaid and overworked persons who are in fact employees, and did not intend the law to transform into employees persons who had never been and are not today such employees."
>
> *Walling* v. *Jacksonville Terminal Co.*, 55 F. Supp. 302, 304.

Since the Fair Labor Standards Act is remedial and humanitarian legislation, it may be proper to depart from consideration of strict legal principles and refer briefly to the position of the trainee.

The length of the training period is not fixed but depends upon the aptitude of the student and averages 7 or 8 days (R. 39 Thomas; R. 90 O'Neil; R. 102 Quincy; R. 110 Dykeman; R. 124 Opinion). Thereafter either the trainee becomes unquestionably an employee or leaves the carrier entirely. There can be no serious economic repercussions from the decision in this case. The actual cash payable, if the Administrator be correct, cannot be substantial to any individual trainee or to all.

The position of the "trainee" is summarized by the Court in *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 at 770:

> "The trainees are not child laborers nor economically oppressed persons nor in danger of injury by sub-standard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. We see no occasion to give an unreasonable interpretation to its words to upset this practice apparently satisfactory to all concerned."

It is apparent that neither a conflict of law nor public interest demand review of this case by this Court, and that the petition should be denied.

B. The Trainees in This Case Clearly are not Employees Within the Meaning of the Fair Labor Standards Act.

Upon analysis the whole legal controversy centers upon interpretation of Sec. 3 (g) reading "'Employ' includes to suffer or permit to work." It is the position of the Administrator that any person who does work which is suffered by and hence could be prevented by Portland Terminal Company is thereby its employee under the Fair Labor Standards Act. The position of Respondent, as of all Courts which have decided the precise question, is that the phrase "'Employ' includes to suffer or permit to work" must be read with common sense and with a view to the matters dealt with by the Statute; that Congress cannot have intended to render liable as an employer of another any person who suffers that other to do work which that other could be prevented from doing. "Manifestly this would encompass all employed humanity." *Walling* v. *Sanders, et al.* (1943) 6 Cir., 136 F. 2d 78, 81.

Argument of Respondent may be epitomized and concretely illustrated by the following. It seems obvious that a person may do work on its premises (1) for the immediate benefit of Portland Terminal Company; (2) for another master; (3) for his own exclusive pecuniary benefit; or (4) for his own benefit or pleasure contributing nothing of value to Portland Terminal Company. It is crystal clear that in the case of (1) the person is an employee of Portland Terminal Company under the Act; that in (2) he is the employee of a stranger and that he cannot look to Portland Ter-

minal Company for wages or the standard thereof; that in (3) he may be an independent contractor and as such is the servant or employee of no one; and that in (4) he may be, for instance, a photographer taking pictures for his own pleasure or benefit, a railroad enthusiast working as a volunteer for his own edification or pleasure, a prospective author, as suggested by Mahoney, J., or, as in the case at bar, a student studying an occupation for his own exclusive benefit.

Nothing could be clearer than that the person in each of the illustrations except (1) is not an employee of Portland Terminal Company under the Fair Labor Standards Act. It is evident that the broad interpretation sought by the Administrator is susceptible of exception in many more instances than in the sole case of a person who is the employee of a third party as suggested by Magruder, J., (see *Schroepfer* v. *Abell Co.*, 48 F. Supp. 88, holding persons, alleged by the plaintiff to be employees under the Fair Labor Standards Act, to be independent contractors) and there are many relationships including the one disclosed by the factual situation in the case at bar which render the Administrator's interpretation strained beyond the bounds of reasonableness. If it is asked why Congress chose to define so broadly the word "employ," the answer is ready. "In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of proving a contract of employment." *Walling* v. *Sanders et al.* (supra) p. 81.

The Court below has pointed out that "In *Jewel Ridge Coal Corp.* v. *Local No. 6167*, 1945, 325 U. S. 161, 163-166, 65 S. Ct. 1063 and *Tennessee*

Coal, Iron & R. Co. v. *Muscoda Local No. 123*, 1944, 321 U. S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949, the Supreme Court set forth the essential elements of work as (1) physical or mental exertion (whether burdensome or not); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business." In this case the third element is wholly lacking. No significance can be attached to the probability that some of the trainees will eventually become regular employees and so indirectly benefit the railroad. Portland Terminal brakeman might secure their instruction on other premises and under other supervision, and even have to pay for it, as do stenographers and lawyers employed by a railroad and who have to be trained before becoming employees; and a Portland Terminal trainee may never become employed by that Company. Furthermore, the second element is present in a degree consistent with control exercised by a teacher over a student rather than by an employer over an employee. We have seen that trainees are not subject to rules or discipline applicable to employees (R. 39, 40 Thomas; R. 85, 86 Haney; R. 112 Dykeman; R. 125 Opinion).

Some confusion is injected into this case by the citation of tort cases to uphold the contention that trainees of Respondent are employees for purposes of the Fair Labor Standards Act. Consideration of cases such as *Brown* v. *Chicago R. I. & P. Ry. Co.* (1926), 315 Mo. 409, 286 S. W. 45; and *Rief* v. *Great Northern Ry. Co.* (1914), 126 Minn. 430, 148 N. W. 309, referred to in his dissenting

opinion by Magruder, J. 155 F. 2d 215, 220, holding in each instance that a railroad trainee is an employee within the Federal Employers Liability Act, indicates conclusively that such decisions have no bearing on the case at bar. In the first place, it is obvious that mere nomenclature does not establish the applicability of the Fair Labor Standards Act. It is conceded and contended by Respondent that circumstances surrounding the relation between trainee and railroad might be such as to constitute a trainee an employee. For instance, if a trainee were hired by contract, performed service valuable to the railroad and for which the railroad was obligated to pay the trainee, there could be no doubt of employment within the Fair Labor Standards Act. It appears that in the cases cited above, the trainee was performing service and work valuable to the railroad. In the Brown case, the trainee fired the boiler, ran the stoker, shoveled coal and cleaned out the cinders.

In the Rief case at 126 Minn. 432, the Court found that the trainee:

> " . . . was expected to perform and did perform such tasks as were assigned to him by the members of the crew in charge of its trains. He helped load and unload freight at way stations, threw switches and did whatever he was ordered to do in the operation of the train."

It is perfectly clear that trainees not performing service of value to the alleged employers are not employees even under the Federal Employers Liability Act. *Bourne* v. *Southern Ry. Co.* (No. Car. 1945) 33 S. E. 2d 239; *Chesapeake & Ohio*

Ry. v. *Harmon's Administrator* (1916), 173 Ky. 1; and see *Fineburg* v. *Public Service Ry. Co.* (1919), 94 N. J. Law R. 55, 108 Atl. 311; *Norfolk & W. Ry. Co.* v. *Bondurant's Admr.* (1907), 107 Va. 515, 59 S. E. 1091.

Tort cases such as *Huntzicker* v. *Illinois Cent. R. Co.* (1904), 129 F. 548, referred to by Allen, J., in the dissenting opinion in *Walling, Administrator* v. *Nashville, Chattanooga & St. Louis Railway*, 155 F. 2d 1016, decided June 1, 1946, holding that the particular trainee in each instance was an employee at common law, are even less in point than tort cases under statutes. Not only does it appear that the particular trainee was engaged in service of value to the company but it is further apparent that the fellow servant rule which is involved rests upon association between a servant and other servants of the same master rather than upon employment such that an obligation to pay wages arises. This fundamental principle is recognized by the Court in the Huntzicker case, which says, at Page 550:

> "Probably the service was not of much value but such as it was it necessarily brought him into association and coöperation with the other servants employed in moving the trains. The rule applicable to the relation of fellow servants rests upon the idea of such voluntary association and coöperation and the assumption of the risk arising therefrom."

and

> "There are cases which hold that it is not even necessary that one volunteering to assist the servants of their employer should have the expectation of reward, if he has no interest in having the thing done, in order to constitute

him a fellow servant. These cases go upon the ground that the party joined the servants and was doing what he did in the assumed relation of a servant and consequently took the risk of the negligence of his fellow servants."

Of course the answer to all tort cases, whether at common law or under statutes, is that indicia establishing such an employment relationship that liability of the master ensues either for torts committed by the alleged servant or to him by a fellow servant, may and often do, fail to establish employment in the sense that the alleged employer is obligated to pay wages. Supporting this contention are the words of the Court in *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d at 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by persons in training are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the touchstones for this Act, which relates only to the wages to be paid to employees. We repeat what we said in *Bowman* v. *Pace*, supra (119 F. 2d 861) that 'wages are due according to principles of contract, not of tort.'"

In this connection Judge Strum in *Walling* v. *The Nashville, Chattanooga & St. Louis Railway* (supra) said at page 1006:

> "For the purpose of this Act whether or not the relationship of employer and employee exists is to be determined upon principles of contract. Tort cases relating to that relationship are inapplicable."

In *Yellow Cab Co.* v. *Magruder*, 49 F. Supp. 605, at Page 607, the Court said:

> "Many decided cases on generally similar factual situations have very properly held a cab company such as the plaintiff in this case, to liability to the public, even when the real relationship between it and the drivers of its cabs is not that of employer and employee, or master and servant."

In *Bowman* v. *Pace Co.*, 119 F. 2d 858, 861, we find:

> "But it is argued that Bowman was so far under the orders of the Pace Company as that Forsyth was not an independent contractor, citing especially 39 C. J. Master and Servant, p. 38; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *Western Express Co.* v. *Smeltzer*, 6 Cir., 88 F. 2d 94, 112 A. L. R. 74. These cases and those cited by C. J. relate to liability for personal injury to members of the public or to the workers, and not to a liability to pay wages. If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed. §§665, 680."

The foregoing illustrates so clearly the correctness of the decision of the Circuit Court below and the illogical position of the Petitioner that it is submitted that review by the Supreme Court of the United States is not warranted.

CONCLUSION

Respondent submits that:

(1) It is apparent that elements justifying issue of a writ of certiorari are absent.

(2) Upon the facts as stated the decision of the Court below is obviously correct.

(3) Each of the two foregoing reasons is, in and of itself, sufficient cause for denial of the petition,

WHEREFORE, Respondent prays this Honorable Court that the petition for a writ of certiorari be denied.

Respectfully submitted,

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August 1946.

APPENDIX A

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MAINE
(SOUTHERN DIVISION)

L. METCALFE WALLING, ADMINISTRATOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, PLAINTIFF

VS.

PORTLAND TERMINAL COMPANY, DEFENDANT

OPINION OF THE COURT

18TH JUNE, 1945

PETERS, Judge: In this action the plaintiff seeks to have the defendant enjoined from violating the sections of the Fair Labor Standards Act relating to the payment of minimum wages and the keeping of records; Sections 15 (a) (2) and 15 (a) (5).

The defendant denies the applicability of the statute in the situation disclosed. The principal question raised involves the employment status of certain applicants for positions who are being trained by the defendant preparatory to regular employment as trainmen, in case they qualify. If, on the evidence, they should not be considered as employees, as the term is used in the Act, the plaintiff is not entitled to the injunctive relief asked for.

Record References and Name of Witness supporting each Finding of Fact.

FINDINGS OF FACT

The defendant is a common carrier by railroad employing yard crews in the operation of its terminal facilities at Portland. Applicants for such positions have to be taught how to do the work. They are called "trainees" or "learners." If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of no immediate advantage to the Railroad however, as the trainee does not displace any member of the regular crew at the time. Rather, it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited. If the trainee finishes training and is certified as fit for a position as trainman his name goes "on the board," as ready for work, and he receives an allowance of $4.00 a day for his training period based on an eight-hour day. If he does not finish training or is not certified as competent he receives nothing. Thus the Railroad obtains a pool of qualified workmen to draw upon and the worker is in line for a job.

R. 20, 24 Thomas

R. 38, 39 Thomas
R. 87-90 O'Neil
R. 108, 109 Dykeman

R. 39 Thomas
R. 64, 65 Morgan
R. 87, 88 O'Neil
R. 105 Johnson
R. 109 Dykeman

R. 33, 39 Thomas
R. 109, 110, 111 Dykeman

R. 107 Johnson
R. 30, 31 Thomas
R. 103 Strout
R. 105, 106 Johnson
Exhibit No. 5.
R. 116, Offered R. 29
Exhibit No. 7.
R. 118, Offered R. 32

R. 30 Thomas

Inexperienced applicants for employment are informed before entering upon the training period that they will receive the allowance only if they "stay and go to work." That is, if they complete the training period and are certified as qualified for employment.

R. 85 Haney
R. 103 Strout
R. 105, 106 Johnson

R. 39 Thomas
R. 90 O'Neil
R. 102 Quincy
R. 110 Dykeman

The length of the training period, if completed, depends upon the aptitude of the learner for the work, the average being seven or eight days. When the applicant files his written application for employment he states "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer."

Exhibit No. 3, R. 114, Offered R. 27

R. 39, 42 Thomas
R. 90 O'Neil
R. 102 Quincy
R. 110 Dykeman

The learners are not required to serve the whole two weeks if they can qualify sooner. As a matter of practice the period of training depends upon the capacity and aptitude of the individual trainee.

R. 39, 40, 42 Thomas
R. 83-86 Haney
R. 112 Dykeman

While training, the learner is expected to be present with the crew to which he has been assigned during working hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such.

R. 30 Thomas
R. 106 Johnson

Prior to October 1, 1943, the persons in training received no allowance, regardless of whether they were accepted for employment; serving without compensation for the purpose of learning the business.

R. 30-33 Thomas

On October 1, 1943, the defendant and the Brotherhood of Railroad Trainmen changed the previous custom by a letter directed to the Chairman of the Brotherhood of Railroad Trainmen reading as follows:

"Effective October 1, 1943, and for the duration of the present Emergency, Student Brakeman, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service. Exhibit No. 9, R. 118, Offered R. 33

"Payment to be made if and when Student has qualified, is accepted for and takes employment.

"If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

There is no evidence as to what the practice regarding compensation will be at the end of the war. The defendant appears to be under no obligation by virtue of any agreement to continue it beyond that point. R. 32 Thomas

Other than above mentioned the defendant does not pay learners the minimum wage provided by Sec. 6 of the Act nor does it maintain records of the kind required by Sec. 11 (c) covering the trainees.

CONCLUSION OF LAW

For the purpose of decision it may be assumed that after the war defendant will revert to its former practice of paying trainees nothing for the training period and that it will continue as at present to pay nothing to those who do not complete the training.

On the issue presented the facts in the case do not differ in any material respect from those set forth in *Walling* v. *Jacksonville Terminal Co.*, 55 Fed. Supp. 302 (affirmed on appeal by the Circuit Court of Appeals in the Fifth Circuit April 23, 1945) and I follow that case and the reasoning of both courts in concluding that the trainee is not an employee under the commonly accepted meaning of the term nor as the term is used in the Act, it not being its purpose to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.

I see no object in repeating or paraphrasing the reasoning in the above case, nor in *Walling, Adm.* v. *Nashville, Chattanooga and St. Louis Ry.*, recently (May 22, 1945) decided the same way by the district court in the middle district of Tennessee; but, finding no violation of law and no reason to apprehend any, I conclude that the bill should be dismissed. Judgment will be entered accordingly.

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